

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA
(DIVISION 2)

**Pham v Minister for Immigration, Citizenship, Migrant Services and
Multicultural Affairs [2022] FedCFamC2G 487**

File number(s):	BRG 233 of 2021
Judgment of:	JUDGE VASTA
Date of judgment:	12 May 2022
Catchwords:	MIGRATION – review of administrative appeals decision – whether decision affected by jurisdictional error – jurisdictional error not established – application dismissed.
Legislation:	<i>Migration Act 1958</i> (Cth): s 359AA, <i>Migration Regulations 1994</i> (Cth): reg 1.15A
Division:	Division 2 General Federal Law
Number of paragraphs:	52
Date of last submission/s:	12 May 2022
Date of hearing:	12 May 2022
Place:	Brisbane
Counsel for the Applicant:	Ms Yu
Solicitor for the Applicant:	TQH Lawyers and Consultants
Solicitor for the First Respondent:	Sparke Helmore

ORDERS

BRG 233 of 2021

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

BETWEEN: DONG PHAM
Applicant

AND: MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT
SERVICES AND MULTICULTURAL AFFAIRS
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

ORDER MADE BY: JUDGE VASTA

DATE OF ORDER: 12 MAY 2022

THE COURT ORDERS THAT:

1. The application filed on 7 June 2021 be dismissed.
2. The Applicant pay the First Respondent's costs of and incidental to the application fixed in the sum of \$6,500.

IT IS NOTED:

- A. That the Court will not provide a written version of the reasons for judgment delivered today, unless an appeal has been lodged or the Court has received a request in writing from either party seeking that written reasons be produced.

Note: The form of the order is subject to the entry in the Court's records.

Note: The Court may vary or set aside a judgment or order to remedy minor typographical or grammatical errors (r 17.05(2)(g) *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth)), or to record a variation to the order pursuant to r 17.05 *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth).

REASONS FOR JUDGMENT

(Ex tempore)

JUDGE VASTA

- 1 On 7 May 2021, the Administrative Appeals Tribunal (“the AAT/Tribunal”) affirmed a decision not to grant the Applicant, Dong Pham, a partner temporary class UK visa. On 7 June 2021 the Applicant asked this Court to review that decision.
- 2 The background to the matter is this; the Applicant is a citizen of Vietnam. He came to Australia on 7 March 2015 when he was aged 19. He came here as the holder of a student visa for the higher education sector. He gave evidence to the department that, after arriving in Australia, he moved to the home of his uncle. His uncle had a friend, and the friend had a daughter. Within days of the Applicant’s arrival he met the daughter. They were of similar age.
- 3 The Applicant said that they decided to marry and that, on 19 February 2016, there was a small ceremony that was held at the uncle’s home. This then led to the Applicant lodging the partner visa with his wife as the sponsor. That partner visa application was lodged on 19 April 2016, and the Applicant’s student visa was cancelled on 5 August 2016. The department reported that the Applicant was an unlawful citizen for a brief period until he was granted a bridging visa on 1 September 2016. It would seem he is still on that same bridging visa.
- 4 Since the application was made the Applicant and the sponsor say that they have a child born on 3 May 2019. The Applicant provided the birth certificate which listed him as the father and the sponsor as the mother and also submitted photographs of the child with himself and the sponsor.
- 5 The Applicant also, as well as the identity documents, had statutory declarations from other people about the relationship, statutory declarations from themselves about the relationship, documents showing separate telephone accounts for the parties but showing that the addresses were the same, the marriage certificate from 19 February 2016, joint bank account statements dated from August 2016 to January 2017 and driver’s licences for both parties and some other photographs of social occasions.

- 6 The Tribunal had to decide whether the parties were in a spousal or de facto relationship. The prerequisite for the granting of the visa is that at the time the visa application was made, as well as at the time of decision, the Applicant must be the spouse or de facto partner of an Australian citizen or Australian permanent resident or eligible New Zealand citizen.
- 7 There is no contest that the sponsor fits that description. There is also no contest that the parties were validly married. However, the Act provides that the Minister (or the delegate or the Tribunal) must be satisfied that there is a mutual commitment to a shared life as a married couple to the exclusion of all others. The decision-maker must be satisfied that the relationship is genuine and continuing, and the couple must live together or not live separately and apart on a permanent basis. The decision-maker must also look at the four parts and the relevant subparts of reg 1.15A(3) of the *Migration Regulation 1994* (Cth) (“the regulations”). In effect, each of those 15 subparts are, as the Tribunal correctly pointed out, effectively, questions which must be answered.
- 8 The first aspect that the Tribunal looked at was the financial aspects of the relationship, including those sub-aspects. The Tribunal looked at the evidence that had been presented to it, the oral evidence given at the Tribunal and the post-hearing submissions that were made. The Tribunal was somewhat critical that, whilst there had been evidence of a joint bank account and other financial statements, none of those were updated. Given that the material before the delegate covered from August 2016 to January 2017 and the Tribunal was reviewing this matter in 2021, the Tribunal, in effect, said that they would have expected that there would be updated bank statements or other evidence of day-to-day spending arrangements.
- 9 The Tribunal was unable to verify whether the joint account is active as claimed or whether the sponsor contributed her salary to the account. The Tribunal also could not verify whether those resources covered both parties.
- 10 The Tribunal said that, having considered the evidence before it, it was not satisfied that, at the time of the visa application and at the time of the decision the financial aspects of the relationship was such that they support a shared financial structure within the relationship or any ongoing pooling of resources or any shared ownership of assets or any liabilities. The Tribunal said that, on balance, this consideration weighed against the Applicant.
- 11 The Tribunal then looked at the nature of the household and the sub-aspects to that matter.

- 12 The Tribunal noted that the Applicant and sponsor lived in the house of the sponsor's parents. As such, they are, in effect, one large family and that now there are three generations living in that house. The Applicant gave evidence of the significant interaction that he and the mother have with the child and the care of the child, with the Applicant being the primary carer during periods while the sponsor is working; that being because the Applicant is prohibited from working under the terms of his bridging visa. The Applicant said that, notwithstanding that he and the sponsor live with the sponsor's parents, the house is large enough for himself and the sponsor to have rooms of their own. He gave evidence that they both participate in and share the housework.
- 13 Overall, the Tribunal afforded the nature of the household some weight in the Applicant's favour.
- 14 The Tribunal then looked at the aspect of social aspects of the relationship and all of the sub-aspects to that. The Tribunal noted that the photographs of the wedding are sparse and that the photographs show very few people in attendance. The Applicant had answered that they only had a very small ceremony in the family home. He did say it is not a wedding, but they wanted to register the marriage. He said that they wanted the wedding to be attended, but their financial circumstances did not permit it. They wanted to be married officially, and they thought that a lavish wedding could wait.
- 15 The Applicant, and this was confirmed by the sponsor, have only limited social interaction with others because of the fact of them caring for an infant. The Tribunal said that they considered the Applicant's claim that he did not know many people at the time he met the sponsor. The Tribunal considered the way in which the Applicant and the sponsor met and their statements that the wedding could wait. But the Tribunal said that this does not entirely explain the lack of supporting evidence of social engagement. The Tribunal said that it acknowledged that having a young infant was a social inhibitor for most parents, and the Tribunal said that they afforded that aspect of the claim some weight, but, on the evidence, the parties do not seem to have shared much other than a few family meals and a modest marriage ceremony.
- 16 The Tribunal said that, having considered the scant evidence of the parties' social aspects, on balance, weighed that consideration against the Applicant.

- 17 The Tribunal then looked at the aspect of the nature of the persons' commitment to each other and each of the sub-aspects. The Tribunal noted the very quick development of a relationship that led to marriage. The Applicant responded that he felt that he had met the right person and that they were compatible. The Tribunal raised issues about the intention of the Applicant in coming to Australia and how his circumstances had changed dramatically.
- 18 The Applicant said that he came to Australia to study English to begin with. He was enrolled to go on to a graphic design course, which was a bachelor degree, but he did not start it. He did the English class and then stopped studying. The Tribunal had asked him where it was that he was enrolled to study the degree course, but the Applicant said that he could not recall because it had been a while. He said it was a university in Brisbane but could not remember the name, even when the Tribunal gave to him a number of names of universities in Brisbane.
- 19 He ended up saying that he had done his English course at a college he thought was called Navitas. He was asked if he really ever had an intention to study, and he said that he had. He said that he completed his English course over about 10 months, and, after the course had ended, he simply stayed at home and went around with his sponsor.
- 20 The Tribunal said that they had concern about the credibility of this aspect of the evidence because it would seem that the Applicant had very little understanding of what it was that he was going to do with regard to studying in Australia. He needed to have had a plan for study so as to be able to obtain a student visa and come to Australia; therefore, the Tribunal reasoned that the Applicant should have known exactly what it was that he was trying to achieve by studying in Australia. The fact that he could not, even after repeated questioning, give any real detail as to what his study intention was when he came to Australia raised concerns for the Tribunal. The very quick romance and relationship that led to a marriage with the sponsor was also a matter that gave the Tribunal concerns.
- 21 The Tribunal said that all of this tended to suggest that the Applicant's intention in coming to Australia on a student visa may have been to gain a streamlined access to entry and then to enter into an arranged marriage. This was put to the Applicant, and he responded that "no, it was not like that", and he said that his intention was to study but, because he and the sponsor both felt that they were compatible with each other, they decided to get married and that this was not a contrived marriage.

- 22 The sponsor said that when she met the Applicant she was unaware of what he was doing in Australia. She only knew that he was freshly arrived from Vietnam. She knew that he was doing English and that he intended to go to university, but she did not know which university.
- 23 She said that the relationship started in May 2015 and that they decided to marry when things got romantic in December 2015, that they felt an instant connection and that their communication was very good. She said that this has not changed. They do not argue. She said it is a long-term relationship.
- 24 The Tribunal noted that the Applicant had not provided any evidence of communications within the relationship such as online messages, telephone calls between the two, text messages or written communications between the parties.
- 25 The Tribunal then put to the Applicant information that they had, pursuant to s 359AA of the *Migration Act 1958* (Cth) (“the Act”). The information was covered by a certificate, and the Tribunal allowed the Applicant and his representative time to look at the certificate and to make any comments as to the validity of it. There were no concerns from the Applicant or the agent about the certificate. The Tribunal said this at paragraphs 30 and 31 of the decision:
- 30 Adopting the procedure in section 359AA of the Act, the Tribunal said it would put to the Applicant information that would, subject to his comments or response, be the reason or part of the reason for affirming the decision under review to refuse to grant the visa. This did not mean the Tribunal had made up its mind, and before the Tribunal reached any conclusion it would take into account any comments or response the Applicant or sponsor may make.
- 31 The Tribunal explained the information and its relevance and said that because the information may be confronting the Applicant should take his time before responding. The Tribunal said the Applicant was entitled to seek additional time to comment on or respond to the information. If he wished to seek additional time he should let the Tribunal know, and it would consider his request. The information was relevant because it might cast doubt on whether you are in and committed to a genuine and continuing relationship. The Tribunal has not reached that conclusion; however, if the Tribunal were to reach that conclusion it would affirm the decision to refuse to grant the visa.
- 26 The Tribunal then told the Applicant what the information was. The information was that the marriage was a contrived marriage, and it was only done for the purposes of immigration, that the sponsor was forced by her parents into marrying the Applicant and that the Applicant is not the father of the baby. The Tribunal said that they asked the Applicant if he understood the information and its relevance and whether he would like more time to consider the information.

27 The Applicant asked if he could request a short break of 15 minutes, and this was done. On the resumption of the hearing the Applicant said he was ready to comment on the information and had had sufficient time to consider it.

28 The Applicant stated to the Tribunal that everything that was said in that information is not true. He said that the birth certificate stated that he is the father, and that has been submitted to the Tribunal. He said the information about contrivance is not true. He said that he and the sponsor are really married and that maybe some people are jealous of that and are trying to cause trouble for them. The sponsor also commented on the information stating:

I feel like the information is not correct. I do have a few friends we hang out with. They saw the relationship as too quick or might have gotten jealous or saw a chance to impact on the visa. That is totally incorrect. We do share a child, and our child's birth certificate has both names, so that information is incorrect.

29 The sponsor continued:

I think the relationship changed after I had the baby two years ago. We are closer than before, and we have a lot more commitment. The kid brought us together, and my feelings changed. We were close before, but caring for the child has brought us closer. He is a very caring husband. We take turns. We share housework. He does care a lot. I had had no relationships at all before he arrived. I am a shy person, and I hang out with very few. I don't socialise a lot on the outside.

30 The Applicant himself stated *"I say our life together has improved. We are closer than before now we have a child, which means our relationship is a lot more close-knit and will be long-lasting. It is permanent."*

31 The Tribunal said that they then considered all the circumstances that had been described in relation to the parties' commitment to each other. The Tribunal noted that the Applicant and the sponsor provided very limited evidence in the way of supporting evidence in relation to their commitment to one another. The Tribunal said that, nevertheless, they have considered all the documentary and oral evidence before it and that which was before the delegate. The Tribunal said that they were not satisfied that the parties had provided sufficient evidence to demonstrate that they shared a long-term commitment to the relationship at the time of the visa application or at the time of this decision.

32 The Tribunal noted that the parties' own statements at the hearing tend to support this with each of them arguing that the presence of the baby had brought them together and that the Applicant said that their life together had improved. The sponsor stated that "We are closer than before now we have a child, which means our relationship is a lot more close-knit." She

had also stated “*I think it changed after I had the baby two years ago, and we are closer than before. We have a lot more commitment. The kid brought us together, and my feelings changed.*” The Applicant said: “*Our life together has improved. We are closer than before.*”

33 The Tribunal said that these statements tend to undermine the concept of a genuine relationship at the time of the visa application and led the Tribunal to conclude, partly on the parties’ own evidence and partly on their failure to support their claims with convincing evidence, that at the time of the visa application they had a strong degree of companionship and emotional support for one another, and their commitment to each other was genuine and long term.

34 The Tribunal found that they were not satisfied that at the time of the application the relationship was consistent with the expectations of the regulations. The Tribunal spoke of credibility concerns that they had with regard to the matter, especially the relatively quick development of the relationship and the hazy account of why the Applicant came to Australia with regard to his student visa. Those matters, the Tribunal, said go to the credibility of the Applicant.

35 The Tribunal said that they did have a concern about the “dobbing” information, which was the information I have spoken about with relation to the s 359AA aspect to the hearing. The Tribunal noted that the Applicant and the sponsor responded with comments that were, to the Tribunal, surprisingly brief, each directing the Tribunal to the names on the birth certificate as though that settled it. The Tribunal said that neither party mounted a strong defence of the child’s parentage even when faced with allegations that the child was not of their relationship and had a different father. The Tribunal noted that a stronger defence from parents might have been expected and might have been capable of undermining the reliability of the allegations made.

36 Instead, the Tribunal said that they were left with the impression that the Applicant wants the Tribunal to look only at the bare facts of the matter in the birth certificate. The Tribunal noted that, in doing so, the Applicant gave a strong impression of not being entirely frank, genuine or truthful on the matter. The Tribunal concluded that, having considered all of the matters before it, the Tribunal weighed the consideration of the parties’ commitment to one another against them and, therefore, against the Applicant’s application.

37 The Tribunal concluded that, having and considered and weighed all the circumstances of the relationship, they were not satisfied that the Applicant, at the time of the visa application, was the spouse or de facto partner of the sponsor. Accordingly, the Applicant did not satisfy cl 820.211(2)(a). For that reason, the Tribunal affirmed the decision.

38 The application proceeded upon one ground and that was that the second respondent, being the Tribunal, failed to comply with s359AA(1)(b)(i) of the Act. That section says this:

If an Applicant is appearing before the Tribunal because of an invitation under section 360: (a) the Tribunal may orally give to the Applicant clear particulars of any information that the Tribunal considers would be the reason, or ... part of the reason, for affirming the decision that is under review, and (b) if the Tribunal does so the Tribunal must (i) ensure, as far as is reasonably practicable, that the Applicant understands why the information is relevant to the review and the consequences of the information being relied on in affirming the decision that is under review.

39 The Applicant argues that the Tribunal did not clearly explain to the Applicant the consequences of the information being relied on in affirming the decision under review. The Applicant argues that this material was central to the issue of whether the Applicant was in a genuine and continuing relationship with the sponsor, and, therefore, those matters, being the non-compliance with s 359AA(1)(b)(i), are jurisdictional in nature, and, therefore, the error is jurisdictional.

40 The Applicant has very helpfully provided a transcript of the proceeding before the Tribunal member. At page 15 of the transcript, the member says this:

MEMBER: Okay. Now, I need to put this to you in a somewhat formal manner.

INTERPRETER: Yes.

MEMBER: And that is to say that the Tribunal has information that it considers would be the reason or a part of the reason for affirming the decision that is under review, subject to anything you may wish to say in comment.

INTERPRETER: Yes.

MEMBER: Okay. Now, you don't have to rush into commenting on this, and you should take your time, and if you want more time you let me know, and I will consider that request if it's reasonable.

INTERPRETER: Yes.

MEMBER: Now, this will be a bit confronting, sir, so you take your time in responding.

INTERPRETER: Yes.

MEMBER: Okay. So the information that I have is relevant because, as I say, it could be part of the reason or the reason for affirming the decision under review.

INTERPRETER: Yes.

41 The Tribunal then told the Applicant what the information was.

42 What it is that I have just read out does not seem to correspond with what the Tribunal has said that they did in paragraphs 30 and 31 of their reasons that I have read into the record. In particular, the Tribunal did not say to the Applicant, as has been said that it did in paragraph 31 of the reasons, that, “*The information was relevant because it might cast doubt on whether you are in and committed to a genuine and continuing relationship.*” Section 359AA mandates that this must be done in (i) of subparagraph (b). It seems to me that this is an error on the part of the Tribunal. In many ways, what s 359AA has done is almost codify what it is that the Tribunal must do.

43 Why it is that this must be complied with by the Tribunal is that s. 359AA is part of the sections that appear after s 357A which lists that the following sections “are an exhaustive statement” of the natural justice and, therefore, procedural fairness rule. Because the Tribunal did not comply with their obligation, there is an error.

44 The question then is does this error amount to a jurisdictional error.

45 It seems to me that it will amount to a jurisdictional error if there is some truly demonstrated unfairness to the Applicant; secondly, if the unfairness has caused the Applicant to act in a way differently to the way the Applicant would have acted if the unfairness had not occurred; and, thirdly, if the action, that would have been taken by the Applicant, could have led to the realistic possibility of a different outcome.

46 In this case, notwithstanding that the Tribunal did not inform the Applicant that this information was going to be relevant because it might cast doubt on whether he was in and committed to a genuine and continuing relationship with the sponsor, such would have been self-evident by the nature of the information itself. When it was that the information was given to the Applicant by the Tribunal his response was to say:

INTERPRETER: May I respond after a short break, Member?

MEMBER: Of course. How long do you need, sir?

INTERPRETER: Would 15 minutes be okay, Member?

MEMBER: Fifteen minutes would be absolutely fine, let me know. When you come back, we’ll see if you want to comment..

47 When it was that the Tribunal reconstituted with the parties – and there is no time noted on the transcript – the Tribunal asked the Applicant:

MEMBER: So have you had sufficient time?

INTERPRETER: Yes, I have.

MEMBER: And do you have comments that you wish to make to me?

INTERPRETER: Yes, I do, and I'd like to say that everything is not true.

48 He then went on to say what it is that the Tribunal, in their reasons, had said that he responded to. The Tribunal has also summarised very well what the sponsor has said in her response to this information. The Tribunal, at the end of the hearing, said to the Applicant, and this is at page 25, line 5:

MEMBER: All right. Well I'm now going to ask your representative if he has any comment that he wants to offer at this stage, rather than give evidence, if there's anything I've missed or he feels has not been canvassed, to let me know now.

INTERPRETER: Yes, Member.

...

MR BUI: I would like to have an opportunity to make further submissions after the hearing.

MEMBER: Why is that? You've had plenty of opportunity, you had a big delay.

MR BUI: Mainly in relation to the allegation, the information that has been provided to the Tribunal.

MEMBER: Because I did notice that you didn't provide any submissions, really, before the hearing and yet you asked for a delay because of COVID, I granted it and yet I got nothing. I mean, I got one or two photographs – four photographs and a birth certificate. So yes, you may have time because you probably weren't expecting the certificate and the allegation.

MR BUI: I didn't know, obviously didn't get the full details of the allegation. So therefore I could not make any submission prior to the hearing... but because I didn't know all the details, so I would like to have a chance to make further submissions if okay, Member.

MEMBER: That's reasonable. How long do you want?

MR BUI: I have a busy schedule for next two weeks, so if I may ask for two weeks.

MEMBER: No, I'm going to give you seven days, sir. It's not a huge job.

MR BUI: Okay. That's fine, Member, thanks.

49 The agent did provide post-hearing submissions which are reproduced at CB 182 to 185. What is significant about those submissions is that there is no comment at all about the allegation or information relating to the contrived nature of the relationship, the forcing by

the parents of the sponsor for the marriage to occur and the paternity of the child. The Applicant argues that if the Tribunal had complied with their obligations, under s 359AA, properly and had given the Applicant further time, then there was a realistic possibility that the result may have been different. Whilst I thank the Applicant's Counsel for that submission, I do find it hard to accept that submission.

50 There is no evidence as to what else would have been said. There is only speculation as to what may have been said, but even in that speculation it is difficult to understand how it would have risen above the response that had already been given that the information was not true, that they are actually in a proper relationship, that the Applicant is the father of the child, and the birth certificate says so, that the information is the result of vengeful or vindictive persons and is done from a place of jealousy and not from one of truth. There is no evidence, nor is there any submission, that the response of the Applicant would, or even could, have been any different if it is that there had been a compliance with the letter of s 359AA.

51 The fact that the Applicant asked for two weeks and was only given one week only would be a matter for consideration if it were that there was evidence that the Applicant, or Applicant's agent, could not have made the submission or was trying to get other information or was trying to do something different but could not do so because the one-week deadline did not enable such to be done. There is no evidence of this. It seems to me that there is no evidence that there was anything different that the Applicant would have done, or would have said, if there had been strict compliance with s 359AA. Because of that I cannot see that there is a realistic possibility of there being a different outcome.

52 For this reason, the error that has been identified by this Court does not amount to a jurisdictional error.

I certify that the preceding fifty-two (52) numbered paragraphs are a true copy of the Reasons for Judgment of Judge Vasta.

Dated: 27 July 2022